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Office - Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 175

BEN FRIEDMAN,

Petitioner,

vs.

HEATING EQUIPMENT MANUFACTURING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, EIGHTH DISTRICT

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HEATING EQUIPMENT MANUFACTURING CO.,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to the Court of Appeals of Ohio, Eighth District, Cuyahoga County, Ohio, to review the judgment entered November 7, 1951, in cause No. 22206 on its docket, entitled "Heating Equipment Manufacturing Co., Plaintiff-Appellee, vs. Ben Friedman, Defendant-Appellant," wherein the Court affirmed the judgment of the Court of Common Pleas of Cuyahoga County. Said judgment of the Court of Appeals was a final judgment rendered by the highest court of the State of Ohio on which a decision could be had by virtue of

the fact that on February 6, 1952, the Supreme Court of Ohio overruled the Motion to Certify the Record.

A transcript of the record of the case is furnished herewith, in accordance with the rules of this Court.

Opinions Below

The finding of the Court of Common Pleas is set forth at length in the Record (R. 20-21). The judgment of the Court of Common Pleas was affirmed without written opinion by the Court of Appeals, Eighth District, on November 7, 1951 (R. 174). The Motion to Certify the Record was overruled by the Supreme Court of Ohio on February 6, 1952, with no written opinion (R. 176).

Jurisdiction

1. The judgment of the Court of Appeals was entered on November 7, 1951 (R. 174). This was a judgment rendered by the highest court of the State of Ohio in which a decision could be had because the Supreme Court of Ohio, on February 6, 1952, overruled the Motion to Certify the Record (R. 176).

2. Upon consideration of the Application of counsel for Petitioner, on April 29, 1952, it was ordered by this Court that the time for filing Petition for Writ of Certiorari be extended to and including July 5, 1952 (R. 177).

3. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

4. The section of the Constitution of the United States that is involved is Amendment XIV, Section 1, which reads as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. The federal questions sought to be reviewed arise from the denial to the Petitioner of due process of law and the equal protection of the laws as guaranteed in the XIV Amendment of the Constitution of the United States, Section 1. Petitioner contends that he was denied these fundamental rights by reason of (1) the failure of the courts of Ohio to give effect to a contract (R. 164) which was clear and unequivocal on its face, (2) in permitting a judgment to be taken against Petitioner based upon the theory of damages although essential facts to compute damages were neither alleged (R. 1-4) nor proved, (3) in giving judgment based on rescission where a rescission of the original contract of sale was neither alleged (R. 1-4) nor proved, and (4) where the previous course of dealings between the parties and subsequent acts and conduct of Respondent would bar them from claiming a rescission of the contract.

The effect of the error of the Court below was to deny fundamental rights to Petitioner which are guaranteed by the United States Constitution, because the case was arbitrarily and capriciously decided in violation of settled principles of law and contrary to fact.

Questions Presented

The question presented is whether due process of law and the equal protection of the laws as guaranteed by the XIV Amendment, Section 1, of the Constitution of the United States is denied where the courts of a State in violation of settled principles of law and contrary to undisputed facts:

(1) Fail to give effect to a contract which was clear and unequivocal on its face.

(2) Permit a judgment to be taken based upon the theory of damages although essential facts to compute damages were neither alleged nor proved.

(3) Permit judgment allowing the return of disputed merchandise where rescission of the original contract of sale was neither alleged nor proved.

(4) Permit judgment based upon rescission where the entire course of conduct between the parties is such as to bar Respondent from claiming a rescission of the contract.

Section of the Constitution Involved

The pertinent Section of the Constitution of the United States is the XIV Amendment, Section 1, which reads as follows:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Petitioner is engaged in the business of selling steel, with his principal office in Cleveland, Ohio. Respondent is a manufacturer using steel in San Francisco, California. Respondent purchased an order of steel from Petitioner and paid for it on sight draft bill of lading. Respondent subsequently claimed that the shipment did not conform to the terms of the original agreement, and asked for a refund of Thirteen Thousand Six Hundred Twenty-four Dollars and Forty-one Cents ($13,624.41), which was computed upon the value of the merchandise allegedly not conforming to the agreement, plus additional costs and expenses charged by Respondent. Respondent accepted and used a portion of the merchandise. A portion of the steel ordered by Respondent was of a gauge that could not be used in its business operations. The order provided that this steel was not to exceed a certain percentage of the shipment. Respondent claimed that it exceeded the agreed percentage and objected to its quality. In previous orders from Petitioner, and from

other sellers of steel (R. 91-92). Respondent had ordered steel of the unusable gauge and quality (R. 95) and had placed it in a warehouse (R. 92-93). This prevailed at the time due to the shortage of steel, among other reasons. After extensive negotiations over a period of seven months, Respondent and agent of Petitioner met in Respondent's office in San Francisco, California, where the agent for Petitioner accepted and signed a letter (R. 164) containing an offer by Respondent to accept the difference between nine and one-half cents per pound and the amount previously demanded of Petitioner by Respondent. The mathematical computation of this difference is Three Thousand Four Hundred Thirty-nine Dollars and Thirty-six Cents ($3,439.36). Despite this contract, Respondent filed suit in the Court of Common Pleas of Cuyahoga County for the full amount previously demanded by it. The petition of Respondent alleged an account between the parties for the disputed steel. It did not allege a rescission of the contract, nor the value of the steel which was delivered. The petition contained an Exhibit (R. 3-4) which set forth the cost price of the steel that was in dispute plus other charges incurred by Respondent thereby. Petitioner filed an Answer of general denial. Respondent secured a judgment against petitioner in the amount of Nine Thousand Three Hundred Twenty-one Dollars and Eighty-four Cents ($9,321.84). Thereafter Petitioner appealed to the Court of Appeals for the Eighth District of Ohio, Cuyahoga County, Ohio, which Court affirmed the judgment of the trial court. Petitioner then filed a Motion to Certify the Record in the Supreme Court of Ohio, and on February 6, 1952, that Court overruled the Motion to Certify the Record.

Specification of Errors

1. The Court of Appeals erred in affirming the judgment of the Court of Common Pleas of Cuyahoga County, and the

Supreme Court of Ohio erred in overruling the Motion to Certify the Record, in the following respects:

a. In failing to give effect to a contract which was clear and unequivocal on its face.

b. In permitting a judgment to be taken based upon the theory of damages although essential facts to compute damages were neither alleged nor proved.

c. In permitting judgment allowing the return of disputed merchandise where rescission of the original contract of sale was neither alleged nor proved.

d. In permitting judgment based upon rescission where the entire course of conduct between the parties is such as to bar Respondent from claiming a rescission of the contract.

2. The errors of the Court of Appeals, and the Supreme Court of Ohio, caused a denial to Petitioner of due process of law and the equal protection of the laws as guaranteed by the XIV Amendment of the Constitution of the United States, Section 1.

Reasons for Granting the Writ

1. *When a case is decided by a State court in violation of settled principles of law, and contrary to undisputed facts, due process of law and the equal protection of the laws are not afforded to the parties.*

In *Holden* v. *Hardy*, 169 U. S. 366, 18 S. Ct. 383, it was said that due process of law implies at least a conformity with the natural and inherent principles of justice, and that: the privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.

This Court has stated that the requirements of constitutional due process impose upon the Supreme Court responsibilities to see that it is not denied. In *Rochin* v. *California*, 96 L. Ed. 154 (advance sheets for January 14, 1952), Mr. Justice Frankfurter stated:

> "However, this Court, too, has its responsibility. Regard for the requirements of the due process clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even towards those charged with the most heinous offenses.' Malinski vs. New York, Supra, at 416-417.
>
> These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder vs. Massachusetts, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty.' Palko vs. Connecticut, 302 U. S. 319, 325."

Further, in *Haley* v. *Ohio*, 332 U. S. 596, 68 S. Ct., 302, Mr. Justice Frankfurter said:

> "The doubts and difficulties arise from the very nature of the problem before us. They arise frequently when this Court is obliged to give definiteness to the 'vague contours' of due process, or, to change the figure, to spin judgment upon State action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of judicial review."

Petitioner was denied due process and the equal protection of the laws.

> "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment.

> Judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment."

It has been held that if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the Court so deciding had jurisdiction over the suit, the judgment is a violation of the Fourteenth Amendment of the Federal Constitution. *Postal Telegraph Cable Co. v. City of Newport*, 247 U. S. 464, 38 S. Ct. 566.

While a judicial decision may not be "law" within the meaning of Article I, Section 10, of the Federal Constitution, it is true nevertheless, that when the decision of the highest Court of a state amounts to a willful, capricious, discriminatory, and arbitrary disregard of the contractual rights of the individual due process of law is not afforded. *Roberts v. N. Y.*, 295 U. S. 264, 55 S. Ct. 689; *Chicago Life Insurance v. Cherry*, 244 U. S. 25, S. Ct. 492; *Brinkerhoff Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 50 S. Ct. 450.

In the instant case the judgment was based upon damages which were neither alleged (R. 14) nor proved, and upon a claim of return of merchandise although rescission was neither alleged (R. 14) nor proved. This is contrary to the holdings that a court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings, *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 281, 34 S. Ct. 496; *Barnes v. Chicago M. & St. P. R. Co.*, 122 U. S. 1, 14, 7 St. Ct. 1043; *Reynolds v. Stockton*, 140 U. S. 254, 265, 266, 11 St. Ct. 773; *Clarke v. Arizona Mutual Sav. & Loan Assn.*, D. C. 217, F. 640, 642 644; *Gentry v. U. S.*, 8 Cir. 101, S. 51.

2. *A denial of due process and equal protection of the laws in the State courts is State action within the meaning of the XIV Amendment and presents a case where the jurisdiction of this Court properly may be invoked.*

Whether the taking of property or personal rights is under a judgment, order, or administrative regulation, the defendant must not be denied the right to show that, as a matter of law, the ruling was so arbitrary, unjust, or unreasonable as to be a deprivation of property in violation of the Fourteenth Amendment. *Washington ex rel. Oregon R. Nav. Co.* v. *Fairchild*, 224 U. S. 510, 32 St. Ct. 535; *Chicago M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 10 St. Ct. 462; *Smyth* v. *Ames*, 149 U. S. 466, 18 S. Ct. 418; *Chicago M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 173, 20 S. Ct. 336.

Action by any division, department, or branch of the State, including the judicial branch, is State action within the meaning of the Fourteenth Amendment. *Ex parte Va.*, 100 U. S. 339; *Virginia* v. *Rives*, 100 U. S. 313; *Mooney* v. *Holan*, 294 U. S. 103; 55 St. Ct. 340; *Twining* v. *N. J.*, 211 U. S. 78, 29 S. Ct. 14.

A judicially established rule is subject to the same constitutional limitations as those established by the State Legislature. *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979, 984, 985. At page 984:

> "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form."

In the case of *Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 836, Mr. Chief Justice Vinson said:

> "That the action of State courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which had long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. That, in Virginia *vs.* Rives, 100 U. S. 313, (1880) this Court stated: 'It is doubtless true that a state may act through different agencies, either by its Legislative, its Executive, or its Judicial authorities; and the prohibitions of the Amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.' In ex parte Virginia, 100 U. S. 339, 347 (1880), the Court observed: 'A State acts by its Legislative, its Executive, or its Judicial authorities. It can act in no other way.' In the Civil Rights Cases, 109 U. S. 3, 11, 17 (1883) this Court pointed out that the Amendment makes void 'State action of every kind' which is inconsistent with the guarantees therein contained, and extends to manifestations of 'State authority in the shape of law, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion.
>
> Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided."

The provisions of the Fourteenth Amendment are universal in their application to all persons within the territorial jurisdiction of the U. S. without regard for any differences of race, of color, or of nationality. To invoke the Fourteenth Amendment, it is not necessary that petitioners show that they are members of a minority group,

or that their nationality, race, or creed subject them to discrimination. Discrimination may and does result from other causes. Equal protection of laws is a pledge of equal laws, equally administered as to all persons. *Truax* v. *Raich*, 239 U. S. 33, 36 S. Ct. 7.

3. *Conclusion.* When the State Court fails to give effect to a contract which is clear and unequivocal on its face; where judgment is had on a theory of damages which is neither alleged nor proved; where the judgment is based upon return of merchandise where there is no allegation or proof of rescission of the contract; and where the entire conduct of the parties is such as to bar rescission; in such case the State courts have denied the parties due process of law and the equal protection of the law, and for that reason the jurisdiction of this Court should be invoked. The question is not limited to a correction of error in the State Court but concerns the fundamental rights guaranteed by the United States Constitution and where such rights are violated by the State courts, only this Court can provide the means of safeguarding such rights upon which our entire judicial system is based. When the Supreme Court of Ohio refused to grant the Motion to Certify the Record it denied Petitioner the right to be heard on the errors complained of and denied to him procedural due process.

In *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 64 S. Ct. 599, the Court said:

> "What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effects upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. Davidson *vs.* New Orleans, 96 U. S. 97, 107, 108, Ballard *vs.* Hunter, 204 U. S. 255, 27 S. Ct. 261; North Laramie Land Co. *vs.* Hoffman,

268 U. S. 282, 45 S. Ct. 491; Dohny *vs.* Rogers, 281 U. S. 369, 50 S. Ct. 299, and cases cited. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

Argument

Petitioner was denied due process and the equal protection of the laws because the State courts in violation of settled principles of law and contrary to undisputed facts erred in the following respects:

1. *In failing to give effect to a contract* (R. 164) *which was clear and unequivocal on its face.*

The uncontradicted and undisputed evidence was that Petitioner's agent Coquillard on the occasion of his second trip to San Francisco signed a letter acting on behalf of Petitioner, which letter was drafted and prepared by Coquillard and Respondent at Respondent's office and at Respondent's request. (R. 73-74) By the terms of this agreement Petitioner agreed to pay upon demand to Respondent the difference between 9½ cents per pound and $13,624.41 as indicated on Respondent's invoice. This latter amount referred to is contained in the computation of damages that is an Exhibit and attached to Respondent's petition (Appendix A), (R. 3-4) and the amount of $13,624.41 is arrived at by listing at 10½ cents per pound the 107,211 pounds of steel that was in dispute, plus warehousing, overhead, and all other expenses incurred. Therefore, the agreement of Petitioner to pay the difference between that amount and 9½ cents per pound is the equivalent of a $20.00 per ton allowance on the disputed portion, plus payment of expenses incurred. The mathematical computation of the sum of that difference is $3,439.36. That is the maximum recovery that should be possible under the facts in this case.

If a rescission had been effected, this agreement represented a subsequent sale of the goods in question to Respondent. In any event, it is an agreement arrived at between the parties for a valuable consideration and disposing of their differences. Since the action was brought subsequent to this agreement, the Respondent cannot claim recovery for the full value of the goods when such goods are the property of Respondent at the time that they brought suit.

Such a modification should be given effect. *Cragin* v. *Eaton*, 153 Miss. 151, 97 So. 532; *Johnson* v. *Broughton*, 183 Ky. 628, 210 S. W. 455; *Treras & Schack* v. *Napel Mills Co.*, 241 Mass. 452, 135 N. E. 477; *Ellis Gray Milling Co.* v. *Sheppard et al.*, 215 S. W. 2d 57.

The Court should have found as a matter of law that the maximum recovery possible if Respondent prevailed is the amount stated in the agreement which when computed is $3,439.36.

2. *In permitting a judgment to be taken based upon the theory of damages although essential facts to compute damages were neither alleged nor proved.*

Where Buyer alleges that the goods did not conform to the contract, but does not allege, nor prove in evidence the value of the goods at the time of delivery, does Buyer state facts sufficient to constitute a cause of action for damages for breach of warranty?

As a matter of law, the verdict of the jury cannot be sustained on the theory of breach of warranty because Respondent did not allege the value of the goods delivered to him and introduced no evidence on this. Instead, Respondent's petition computed the alleged damages in an Exhibit as a part of the petition (R. 3-4). Examination of this computation reveals that Respondent asked for the return of the money paid for the portion of the goods de-

livered that Respondent contends did not conform to the contract.

Nevertheless, the trial court charged the jury that if its verdict is for the Respondent ". . . it should be in such an amount, the difference between the value of the steel at the time of the delivery to the Buyer, and the value, if it had answered the warranty, plus any special damage . . ." (R. 154).

The facts in the case and charge of the Court are remarkably similar to *Crooks & Co.* v. *The Eldridge & Higgins Co.* (1901) 64 Ohio St. 195, 60 N. E. 203. There, plaintiff contended that bags of sugar delivered "were unfit for use" and "that there was no consideration" for the payment of the money sought to be recovered. The Supreme Court held that to sustain a recovery for plaintiff under this petition it must be shown that the sugar was entirely worthless. If the sugar was proven to have any value whatever, the plaintiff could not recover the price paid for it without rescinding and avering and proving that it made, or offered to make, restitution of the entire lot of sugar purchased, within a reasonable time. The trial court charged that "the amount of its recovery should be such amount as the evidence shows plaintiff paid the defendant for said 187 bags of sugar, and the expense incurred in connection therewith, not to exceed the sum of $1,012.56, less the value, if the evidence shows there is any value, of the 187 bags of sugar, now in plaintiff's possession."

The Supreme Court held that "This charge was not applicable to the case made in the pleadings. It is evident that the jury made up their verdict upon the measure of damages thus given to them by the court; for if they had found that the sugar was of no value at all their verdict must have been for the plaintiff for the full amount paid

for the sugar, which it was not. But having found that the sugar had some value the jury must necessarily have found for the defendant under the issues as made up and not amended. The Court, however, required the jury to return a verdict for damages which were not claimed in the petition. In fact the Common Pleas Court seems to have tried this case on the theory that it was a case for damages, although the jury were emphatically instructed that the plaintiff could recover only upon the special matters alleged in the petition. In this we think there was substantial and prejudicial error."

The verdict of the Common Pleas and the Circuit Court affirming it were thereupon reversed.

This precise situation was repeated in the case at bar and here too the jury did not give Respondent a verdict for the full amount paid for the steel, but instead must have computed its verdict on damages which were not claimed in the petition. Under the rule of the *Crooks* v. *Eldridge* case cited, we believe that there was substantial and prejudicial error.

In order to sustain damages for breach of warranty the value of the goods delivered must be pleaded and proved. Ohio General Code Section 8449 (7), *Klein Structural Steel Co.* v. *John J. Pool Co.*, 26 Ohio App. 420, 160 N. E. 520, (1927), *Willeke* v. *Neuenschwander*, 24 Ohio Law Abs. 540 (Ohio Appeals) (1937).

Respondent made no attempt to either plead or prove the value of the goods delivered and therefore cannot recover damages for breach of warranty.

3. *In permitting judgment allowing the return of disputed merchandise where rescission of the original contract of sale was neither alleged nor proved.*

Where goods are delivered to Buyer under contract, and Buyer alleges that they notified Seller that they would hold

the alleged non-conforming shipment subject to the order of Seller, is this sufficient to sustain an action in rescission?

The only allegation in Respondent's petition on the question of rescission was: ". . . Upon discovery of the overshipment of the lighter gauge steel, the plaintiff notified the defendants that they, the plaintiffs, would hold the excess shipment of light weight steel subject to the order of the defendants and accordingly the plaintiff placed said steel in a warehouse in San Francisco . . ." (R. 1) and further that ". . . defendant failed to direct the disposition of said steel so held in storage . . ." (R. 2).

Respondent's allegation that they ". . . would hold the excess shipment . . . subject to the order of defendants . . ." is insufficient to allege a cause of action based on rescission.

The pertinent portions of Section 8449 of the General Code of Ohio bearing on the question of rescission are as follows:

> "Section 8449, Breach of Warranty. (1) When there is a breach of warranty by the seller, the buyer may, at his election—
>
> (b) Accept or keep the goods and maintain action against the seller for the damages for the breach of warranty;
>
> (c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;
>
> (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods already have been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.
>
> (3) When the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to

return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if the deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the Buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) When the Buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) When the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods, as bailee for the seller, but the subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcements of such lien allowed to an unpaid seller by section eighty-four hundred and thirty-three."

Section 1 (d) cited above expresses the general rule. This was at issue in *McClarran* v. *Longdin-Brugger Co.*, 24 Ohio App. 434. That case involved facts similar to the case at bar wherein buyer claimed that goods received from seller did not comply with the contract of sale. The Court stated:

> "The general rule is that one of the essentials to a rescission of the sale for a breach of warranty is that the goods must all be returned, and that the buyer will not be permitted to return a part and return the balance."

And further that:

> "There are some authorities to the effect that under certain circumstances a small portion of the goods need

not be returned, or where the contract is severable and not entire, or where the article sold is one which must be used before its quality can be ascertained, the quality not being apparent from examination, it is the right of the buyer to use such portion of the property as is necessary to determine the quality, and that such use does not affect the right to rescind and return the goods, with proper notice, to the seller. However, the weight of authority seems to be that, even where a small portion of the goods might be retained, such rule could have no application where so large a portion of the goods has been retained as appears from the pleadings and the record in this case."

The Court goes on to say:

"Ohio is one of the states that has adopted the Uniform Sales Act. Section 8449, General Code, provides how the buyer may rescind the sale for a breach of warranty as to quality. One of the provisions is that the goods must be returned and notice be given within a reasonable time. There is nothing in this section to the effect that any part may be retained, and the defendant having retained and paid for so large a portion of the goods, to-wit, four-tenths, or nearly one-half, we think that his right and remedy, if he has any, as appears from the answer and the record in this case, would be one for damages under Section 8429, which also provides that after acceptance of the goods, if the buyer claims damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale, the buyer must 'give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach.' *Bloch v. Eastern Machine Screw Corp.* (C. C. A.), 281 F., 777."

In the case at bar, the petition discloses that of 251,080 pounds of steel shipped, 107,211 pounds is complained of as not conforming to the contract. (See Exhibit attached to plaintiff's petition (R. 3-4).) Since this is disclosed on

the face of the petition, it would negate the idea of rescission.

The Court continued further saying that giving notice is an essential element in an action founded in damages under Section 8429, or an action based on a rescission of the sale under Section 8449, and that defendant (buyer) in that case did not notify seller of his claimed breach of warranty until the filing of the Answer, and there was evidence of having expressed his satisfaction with the goods after received.

The Court held that:

> "Hence, under the answer filed in this case, showing such a large portion of the goods returned, without any allegation of notice of rescission or notice of any claim of breach of any promise or warranty, and the record clearly showing by the defendant's own testimony, that he accepted and retained the goods from the latter part of October until the middle of March, and that he never gave any notice to plaintiff of any claimed breach of any promise or warranty as to quality or otherwise, or of his intention to rescind the sale, or gave any explanation as to why he paid for four tops and shipped back the other six tops, until he filed his answer, we are unanimously of the opinion that the defendant under this record has neither pleaded nor proven a legal defense."

The facts in the case at bar are similar. Even the amount of the goods that were retained by the buyer—four-tenths—is almost the identical amount retained in each case (and this is revealed in the Exhibit attached to plaintiff's petition). The uncontradicted testimony was that Respondent was aware of the alleged defect while the steel was still on the freight cars (R. 65). They did not have to use a portion of it to determine its quality. Under these circumstances the goods should have been returned and notice given within a reasonable time. Respondent failed to do this.

According to Section 8449 (3), Ohio General Code, cited above, the buyer cannot rescind if he knew of the breach of warranty when he accepted the goods. Respondent knew of the condition of the steel but chose to accept it, by using a portion and exercising dominion over the balance which was the subject of his complaint.

The question naturally arises as to whether Section 8430, Ohio General Code, would make valid the allegation of Respondent's petition that they hold at the order of Petitioner. That section reads:

> "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he notified the seller that he refuses to accept them."

It is respectfully submitted that this section does not apply to the case at bar. Section 8430 is pertinent only when buyer refuses to accept the goods and does not concern rescission. The requirements for rescission are specifically set forth in Section 8449, which must be followed. In *McClarran* v. *Longdin-Brugger Co.* the Court did not even consider Section 8430 under facts similar to those of the case at bar, and held that the requirements of Section 8449 must be followed. This is supported by the fact that in *Rheinstrom* v. *Steiner*, 69 Ohio State, 452, the leading case under Section 8430, the entire shipment of labels was rejected and buyer made a positive statement rejecting them. The Court did not have to consider the problem of rescission. There the labels were kept in the original packages as delivered and the Court stated that no prejudice was caused to the sellers by failure to return them because the labels were of no use to sellers. In the fact situation of the case at bar plaintiff must comply with Section 8449 on rescission.

Further, in *Kulber* v. *Fairmount Creamery Co.*, 40 Ohio Op. 170 (Cuyahoga County, 1948) the Court stated:

> "In seeking redress under the remedy of rescission the buyer must act promptly in rejecting the goods after discovery that the goods are not as represented and must also put the seller in status quo."

Respondent's pleading and the evidence does not satisfy this requirement of delivering back or offering to return what it received under the contract.

In the *Kulber* v. *Fairmount Creamery* case cited above the Court pointed out that after buyer's offer to rescind was refused by seller, buyer continued to sell the goods, and that they had knowledge of the breach of warranty, but nevertheless dealt with the goods in such a way as to make it impossible to put the defendants in status quo, and after thus dealing with the goods they could not claim the right of rescission.

In *Willeke* v. *Naunschwander*, 55 Ohio App. 527, 9 Ohio Op. 183, the Court on a similar question stated:

> "The petition, therefore does not state a cause of action for damages for the breach of warranty through failure to allege facts showing the damages were sustained, and does not state a cause of action for recovery of purchase price which had been paid, by reason of failure to allege rescission of the contract and the return of the horses or offer to return same to seller."

Even the return of an allegedly defective automobile to a dealer's lot without informing him of an election to rescind has been held that it did not constitute notice to the dealer of the purchaser's intention to rescind or a compliance with Section 8449 (3), Ohio General Code. *Swisher* v. *Miami Motors*, 81 Ohio App. 97.

An unequivocal offer to return the merchandise to seller was also required in *Hirschel dba Diamond Furnace Co.* v.

Richards, 28 Ohio App. 38, and *Champion Animal Food Co.* v. *L. B. Reich Distributing Co.*, 50 Ohio Law Abs. 199.

And finally, it is stated in *Williston:*

> "But if property and possession have passed and the buyer wishes to remit the property in the seller, a return or offer to return is necessary. It is not sufficient for a buyer who has taken delivery of the goods at said door or place of business merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or request him to come and take them back. But if he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless, upon making offer to do so, he is relieved of the obligation, as stated by a refusal to receive them if tendered." 3 *Williston, Sales*, Section 610 (page 353) (Revised ed. 1948). See also *Millikin* v. *Skilling*, 89 Me. 180, 36 A. 77, quoted and followed in *Mundt* v. *Simpkins*, 31 Neb. 1, 115 N. W. 325.

4. *In permitting judgment based upon rescission where the entire course of conduct between the parties is such as to bar Respondent from claiming a rescission of the contract.*

1. *Where Buyer notifies the Seller that goods delivered do not conform to contract, does Buyer's previous course of dealings and subsequent acts and conduct bar Buyer from claiming rescission of the contract; such acts being acceptance and use of a portion of the goods, placing the remainder in a warehouse with other goods belonging to Buyer, advertising for sale the disputed portion of the goods together with the other goods not received under the contract, selling a portion of the disputed goods, and making a subsequent agreement with Seller concerning the disputed goods?*

Section 8428 of the General Code of Ohio concerning "Acceptance, when complete" provides:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or

when the goods have been delivered to him, *and he does any act in relation to them which is inconsistent with the ownership of the seller*, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

See *McClarran* v. *Longdin-Brugger Co.*, 24 O. App. 434.

The record in the case at bar is replete with instances where buyer, hereinafter designated as plaintiff, did acts inconsistent with alleged ownership of seller, hereinafter designated as defendant. Furthermore, there are numerous indications of acts indicating that plaintiff retained the goods after making his first questionable rejection.

Of 251,080 pounds which was the total amount of steel shipped, plaintiff claimed that 107,211 pounds was an overshipment of lighter gauge steel than that which was ordered. Although Respondent claims to have discovered this fact while the steel was on the freight cars (R. 65), Respondent did not reject the entire shipment, but chose to unload the steel, use a portion of it and store the remainder in a warehouse in which it stored such steel (R. 89-95).

Although Section 8424 (3) of the General Code of Ohio provides that:

> "When the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

There are special circumstances in the case at bar which would indicate that acceptance of a portion of the goods would constitute an acceptance of the entire amount. Authority for this view is taken from Section 8424 (4) of the

General Code of Ohio, immediately following the above-quoted section:

> "The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties."

Petitioner submits to the Court the proposition that as a matter of law arising out of the usage of the trade, special agreement between these parties, and the course of dealings between the parties that the Respondent should be held to have accepted the shipment and should not be allowed to claim a rescission in view of the testimony at the trial. The jury should have been instructed by the trial court that Respondent's conduct and dealings previous to the shipment at issue, and its conduct and acts subsequent to the delivery are as a matter of law inimical to the theory of rescission.

Respondent originally contracted for a quantity of steel, in fact, forty per cent of the shipment, that they could not use in their business of manufacturing stoves because the gauge was too light. For reasons of their own which do not appear in the evidence, but probably due to the great demand for steel at the time, they had been making other purchases in this manner. The Exhibit which is attached to their petition (R. 3-4) shows that they had already stored at the Ballinger Warehouse, at the time of receipt of this disputed shipment, non-usable steel from Mojul (another source of supply) non-usable steel received from this defendant in a previous shipment not in dispute here, and non-usable steel which is merely identified by Respondent as "our property—too sprinkled for use."

In view of the fact that Respondent had contracted for a shipment to consist in part of non-usable steel (R. 66, 77), and had been doing that previously, not only with this Petitioner, but with other suppliers of steel (R. 81-84), the

act of Respondent in accepting a part of the shipment of the steel should operate as an acceptance of the whole shipment. If this view is adopted Respondent foreclosed itself of any claims by its acceptance of the shipment.

However, in addition to the previous course of dealings of Respondent showing that there was an acceptance of the steel, Respondent's subsequent acts and conduct are inconsistent with any rejection of the alleged non-conforming shipment.

From the very outset Respondent did not follow the course of a clear cut rejection of the entire shipment. Instead, Respondent's petition makes the half-hearted statement that, ". . . Upon discovery of the overshipment of the lighter gauge steel, the plaintiff notified the defendants that they, the plaintiffs, would hold the excess shipment of light weight steel subject to the order of the defendants and accordingly the plaintiff placed said steel in a warehouse in San Francisco . . ."

Respondent also alleged that Petitioner ". . . failed to direct the disposition of said steel so held in storage . . ."

However, Respondent failed to act in a manner consistent with these statements. There was no testimony of Respondent having notified Petitioner that they were holding the alleged non-conforming shipment subject to the order of Petitioner. Instead, the only testimony was that Respondent telephoned Petitioner to complain about the shipment (R. 54). Respondent did not take a definite position on the ownership of the steel. Their position was that they wanted their money back for the portion of the shipment that they claimed did not conform. This did not amount to a rescission or tender back of the steel.

The Petitioner came out to San Francisco in February, 1948 (R. 54), and afterward, until July of 1948 ensued efforts to sell the steel. Respondent contended that Petitioner was selling it for himself and Petitioner contended

that any efforts made by him were only to assist Respondent and that it was Respondent's steel that was being offered for sale. From the first, Petitioner stated that he hoped to sell to Respondent in the future and any efforts made by Petitioner were only to attempt to satisfy Respondent, if possible (R. 113).

Where there is a conflict, as there is here, of the testimony of the parties, the Court should look to the actions of the parties to determine the issue. We contend that as a matter of law, Respondent's actions were inconsistent with rescission. The previous course of dealings has already been discussed. With regard to subsequent acts and conduct certain questions are pertinent. If Respondent took the position that Petitioner had accepted the return of the steel and was to dispose of it as a result of Petitioner's first trip to San Francisco, why did Respondent thereafter concern itself over the sale of the steel? Why did they attempt to sell it themselves, and advertise it for sale together with other steel that they owned? Why did they store the steel in a warehouse which they used for the purpose of storing steel that they purchased, which steel they were unable to use? And why did they prepare a letter which was signed by Coquillard, acting for plaintiff, which contained terms for the disposition of the steel? (R. 164).

In view of these circumstances the conduct of Respondent before and after the sale at issue would negative the idea of rescission, and in any event result in a waiver thereof.

See 35 *Ohio Jurisprudence*, Section 245, page 982, where the following is stated:

> "Continued use of the chattel, after notice of rescission under the circumstances set out, may, however, constitute a waiver of his Option to rescind, though not of his option to claim damages due to the breach. If the buyer has resold the goods or if the

goods have been destroyed or injured, even without the buyer's fault, it has usually been held that the possibility of rescission is gone."

In the case of *Kulber v. Fairmount Creamery Company*, 40 Ohio Op. 170, 80 N. E. 2d 246 (C Cuyahoga 1948), the plaintiff's evidence showed that after the offer to rescind the sale, which was refused by the purchaser, the plaintiff continued to make sales to other customers. The Court stated:

"By their own acts, therefore, after they had knowledge of their claim of breach of warranty they dealt with the goods in such a way as to make it impossible to put the defendants 'status quo'. They could not, therefore, after thus dealing with the shrimp, claim the right of rescission."

In 46 *American Jurisprudence* 896, Section 765, it is stated:

"Moreover, after an attempted rescission by the buyer of chattels, which the seller has not accepted, the buyer, if he intends to rely upon it, must adhere thereto and act consistently therewith, and if he thereafter continues to use the property as his own, he may be held to have waived or abandoned the rescission, and may be precluded from rescinding or asserting a claim that he has rescinded; in other words, the use of chattels sold, by the purchaser, after the seller has refused the latter's tender of them in a rescission of the contract defeats the attempted rescission, if the property was used for the personal benefit of the purchaser, and not merely in compliance with his duty as bailee of the seller."

As a matter of law the evidence in the case before the Court showed special circumstances arising out of usage of trade, course of dealing between the parties, special agreement, and subsequent acts and conduct of Respondent,

all of which should preclude Respondent from asserting the remedy of rescission, and compelling judgment for the Petitioner. No instruction as to this was made by the trial court.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD D. WYNER,
Counsel for Petitioner.

Dated July 3, 1952.

MILTON H. WYNER,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 175

BEN FRIEDMAN,
Petitioner,

vs.

HEATING EQUIPMENT MANUFACTURING CO.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Eighth District of the State of Ohio.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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